No. 92- 93-49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BILL ELDRIDGE, Individually and as Administrator of the Estate of David Eldridge
Petitioner,

v.

COBB COUNTY, a political subdivision of the State of Georgia; ROBERT HIGHTOWER, in his official capacity as Director of Public Safety, Cobb County, Georgia,
Respondents.

and E.A. CAMPUZANO, SCOTT HALTER, and LARRY SOPER,
Defendants in the District Court.

Supreme
JUL 1993

Petition for Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the Court below in granting summary judgment to defendants Cobb County and Robert Hightower and in setting a subsequent investigation standard for analysis of a §1983 case is in direct and irreconcilable conflict with the standards set forth in this Court's rulings in *Monell v. Department of Social Services of the City of New York*, 98 S. Ct. 2018 (1978) and *City of Canton, Ohio v. Harris*, 109 S. Ct. 1197 (1989) and whether the ruling below conflicts with the decisions of other Courts of Appeals.

Whether evidence of an investigation into police acts of violence which was conducted subsequent to the incident is sufficient to defeat a §1983 claim on Defendant's Motion for Summary Judgment even though there is evidence of a policy or custom of deliberate indifference to police violence and even though that subsequent investigation was conducted only in response to Plaintiff's complaint and was not begun internally in response to the incident.

Whether summary judgment against the Plaintiff is proper where there is evidence that the county's failure to prohibit girlfriends from riding in police cars is a custom or policy that caused police brutality.

Whether summary judgment against the Plaintiff is proper where the county has no regulation for transporting an injured person in custody and where that custom or policy of deliberate indifference caused further physical and emotional harm to the arrested victim of police brutality.

Whether summary judgment against the Plaintiff is proper where there is evidence that the county failed to train its officers to handle a special, distinct and recurring problem which had been identified by the county as a problem requiring special attention and a task force.

LIST OF PARTIES

The names of all parties to this case appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bill Eldridge, individually and as Administrator of the Estate of David Eldridge, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Eleventh Circuit on February 19, 1993, rehearing denied April 7, 1993.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court granting Respondents' Motion for Summary Judgment is not reported and is reprinted in the Appendix hereto at 1a.

The opinion of the United States District Court denying Petitioner's Motion for Reconsideration is not reported and is reprinted in the Appendix hereto at 15a.

The order of the United States Court of Appeals for the Eleventh Circuit affirming the order of the United States District Court is reprinted in the Appendix hereto at 25a.

The order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's petition for rehearing is reprinted in the Appendix hereto at 26a.

JURISDICTION OF THE COURT

The order of the Court of Appeals affirming the order of the District Court was entered on February 19,1993. Petitioner's petition for rehearing was denied by the Court of Appeals on April 7, 1993. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The text of these constitutional provisions is set forth in Appendix A hereto at page A- .

This case also involves 42 U.S.C. §1983 which provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Plaintiff brought this action for the injuries and damages sustained by his sixteen (16) year old son, David Eldridge, from the brutal beating David sustained at the hands of three Cobb County policemen, Officer Campuzano, Officer Halter and Sergeant Soper. The beatings and mistreatment occurred at the time of arrest, while David was handcuffed, while David was transported to the hospital and at the hospital.

Defendant-Respondent Robert Hightower has been the director of the Cobb County Police Department since October 2, 1972 and oversees the entire Police Department for Cobb County. (Deposition Hightower, pp. 3 and 4).

On the evening of the incident, the police were called to a loud party of high school children which David Eldridge, Jeff Clark and their girlfriends were attending.

On that evening, officer Campuzano had his girlfriend, now his wife Angie Campuzano, riding with him for the first time. (Deposition Campuzano, p. 23). Apparently Sergeant

Robinson had given permission for her to ride with him, but no written waiver was obtained because one could not be found. (Deposition Campuzano, p. 26). Angie complained that it was real boring and gave Campuzano a hard time. (Deposition Angie Campuzano, p. 9).

When the call went out for a loud party, Campuzano and his girlfriend responded as back-up. (Deposition Angie Campuzano, p. 10).

David Eldridge and Jeff Clark were in David's jeep to leave the party. Officer Campuzano went to the jeep and asked David for his license and registration. David complied with this request and Campuzano handed the documents back to David. (Deposition Moody, Exhibit p. 000012). At that time Campuzano left to investigate a vehicle that had been left running unattended as well as some other teenagers. (Deposition Campuzano, pp. 32-33).

David then left the scene. Angie Campuzano said to Campuzano "I can't believe he's leaving. Why is he leaving?" (Deposition Campuzano, p. 36). Campuzano and Angie followed David, with blue lights flashing and sirens blaring. (Deposition Campuzano, pp. 36-37). On seeing the blue lights, David panicked and a short chase ensued. (Deposition Jeff Clark, p. 36). David hit a curb and blew out two tires, and he and Jeff Clark jumped out of the jeep and ran. (Deposition Jeff Clark, pp. 40-41). Campuzano gave chase, threatening to kill David and yelling obscenities. (Deposition Jeff Clark, pp. 44-45, 52; Deposition Moody, Exhibit p. 000009).

Jeff Clark, hiding behind a woodpile, heard the entire incident. Campuzano chased David, shouting "I'm going to kill you, motherfucker" and "you're dead asshole, you're dead." (Deposition Jeff Clark, pp. 43-51).

David tripped and stopped running. He had not responded to any of Campuzano's threats or obscenities. Campuzano punched David twice in the face. (Deposition Moody, Exhibit pp. 000009, 000015, 000016 and 000130). Campuzano placed one handcuff on David, and David tried to resist the handcuffing. (Deposition Campuzano, pp. 44-46). After a short lull, Campuzano punched David in the face again. (Deposition Moody, Exhibit p. 000127).

Officer Halter, a good friend of Campuzano, came up and completed handcuffing David. While David was handcuffed Halter struck David. (Deposition Halter, pp. 42-43, 45). Halter hit David over the head four (4) times with his night stick, hit him four (4) times in the stomach, kneed him in the back, kicked him, knocked him down and hit him in the face. (Deposition Halter, pp. 42-43, 45; Deposition Moody, Exhibit pp. 000018-20, 000059). Halter was profane, cussing, screaming and out of control. (Deposition Soper, p. 19; Deposition Moody, Exhibit p. 000073). Sgt. Soper, the superior officer of Campuzano and Halter, came on the scene and "cracked the kid in the solar flex [sic] with my flashlight." (Deposition Moody, Exhibit p. 000072). Soper hit David because he was mad and to shut him up and did not hit Halter because "he's the police." (Deposition Soper, p. 28).

Soper ordered Halter to take David to the hospital, despite the fact that Halter had been out of control with anger at David. (Deposition Soper, p. 32; Deposition Moody, Exhibit p. 000081). While Halter had David in custody at the hospital, Halter tore off David's preadmission tag and told David that he did not regret what he had done. (Deposition Moody, Exhibit pp. 000011, 000027). David suffered a broken nose, 12 stitches and bruises. (Deposition Moody, Exhibit p. 000010).

Sergeant Soper left the scene of the incident and interviewed no witnesses although a small crowd had gathered. He did no investigation whatsoever that night or subsequently and never reviewed the reports of Halter, Campuzano or Woll, another officer who was on the scene. Soper did not write a report that he had struck David. (Deposition Soper, pp. 31, 33, 41).

Both Lt. Stymus and Capt. Turner, the superior officers in the chain of command, were told about the incident, but they too did absolutely nothing and did not report it to Internal Affairs. (Deposition Soper, p.33).

Officers Campuzano, Halter and Woll wrote reports. Campuzano and Halter were together doing theirs, which on their faces contain erroneous information, obvious omissions and contradictions and which contradict their later statements to Major Moody. Fellow officers criticized the reports for being too factual. (Deposition Moody, Exhibit p. 000138).

The reports were approved by Sgt. Stephens without any further investigation. (Deposition Soper, p. 33). Neither Campuzano, Halter or Woll further investigated the incident. (Deposition Halter, pp. 65-66).

At this point, the entire chain of command of the precinct had covered up the incident completely. It would not have come to light or been investigated had the Plaintiff not pursued it. Plaintiff was the only person who conducted an investigation, and it was after the Plaintiff called Hightower that Hightower called Moody at Internal Affairs. Only then was an investigation conducted by Cobb County. (Deposition Moody, pp. 29, 5-6).

The police officers had used excessive force on prior occasions and had exhibited propensities for violence. On at least

two (2) previous occasions, Campuzano and Halter had not filed proper reports or firearm reports when they had used excessive force; nothing was done at those times by the County. (Deposition Campuzano, pp. 68-70).

Additionally, Officer Halter and Sgt. Soper were known for their violent propensities and were known to have difficulty dealing with teenagers. Sgt. Soper, who did the evaluations of Campuzano and Halter, knew that Halter had a temper, and loses it, especially around kids, and that Halter could not relate to or handle kids at all. (Deposition Moody, Exhibit p. 000073; Deposition Soper, p. 18). Others knew about Halter's temper and problem with kids, including Capt. Turner, but nothing was done, no evaluation, psychiatric care or even notation was made. But Halter was allowed to break up teenage parties repeatedly.

Major Moody had written a report, while she was lieutenant, that she had grave questions about Soper's credibility, that Soper handled children poorly and that children could be in jeopardy. (Deposition Moody, p. 32). Yet nothing was done and there was no affirmative policy to control officers with personality disorders such as these.

At the period of time in which this incident occurred, there had been a substantial number of teenage parties about which there had been a lot of publicity. At one such party, a juvenile had been killed. A special task force was created by Cobb County to deal with the problem and to break up a lot of these parties. However, Campuzano, Halter or Soper received no training whatsoever in this regard even though they dealt with such parties on a routine basis. (Deposition Halter, pp. 16-19).

REASONS FOR GRANTING THE WRIT

The Decision of the Court Below Granting the Summary Judgment Motion of Cobb County and Robert Hightower is in Direct and Irreconcilable Conflict with this Court's Rulings in *Monell v. Department of Social Services of the City of New York*, 98 S. Ct. 2018 (1978) and *City of Canton, Ohio v. Harris*, 109 S. Ct. 1197 (1989) and With Decisions of Other United States Courts of Appeals.

This Court and other Courts of Appeals have set forth the standards under which local governments and local government officials may be liable under 42 U.S.C. §1983 for constitutional violations. The Court in *Monell* stated that

> "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983".

Monell v. Department of Social Services of the City of N.Y., 98 S. Ct. 2018, 2037-38 (1978).

This Court and other Courts of Appeals have rendered decisions in subsequent cases setting forth under what circumstances a government and government official may be found to have acted pursuant to a policy or custom so that such government and government official will be found liable for constitutional violations.

In this case, the Court of Appeals, in affirming the opinion of the District Court, failed to properly apply the standards set forth by this Court and other Courts of Appeals. Additionally, facts which presented genuine issues under these standards were ignored and misinterpreted and summary judgment was granted to two defendants, Cobb County and Robert Hightower.

The decision granting summary judgment is irreconcilable with *Monell* and *City of Canton* and is in conflict with decisions of other Courts of Appeals. Therefore, this Court should grant certiorari and reverse the judgment of the court below to ensure that the mandate of *Monell* and *City of Canton* and the fundamental constitutional rights that they protect are not ignored.

A. FAILURE TO SUPERVISE AND INVESTIGATE FORMER ACTS OF VIOLENCE

The Court of Appeals, in affirming the District Court, granted summary judgment to the defendants Cobb County and Robert Hightower. With regard to Plaintiff's claim that the Defendants failed to supervise and investigate former acts of violence, the Court below ignored the standards set forth by other Courts of Appeals and applied a subsequent investigation standard, stating that since the government did investigate and take action against the officers, after the incident occurred, then there was no showing of a policy or custom of ignoring improper police behavior or failing to supervise officers. Order of Court, 7a. This "subsequent investigation" standard is in direct conflict with the standards followed by this Court and by other Courts of Appeals.

It is clear that the Court below failed to follow precedent in three areas of analysis:

1. The Court failed to analyze acts of the government taken *prior* to the incident to determine whether the government executed a policy or custom which inflicted the injury;

2. The Court failed to analyze the non-action of the county immediately following the incident of police brutality; and

3. The Court ignored the fact that a group of officers acted with police brutality.

Had the Court analyzed the facts under the standards set by this Court and other Courts of Appeals, summary judgment would not have been granted to defendants Cobb County and Robert Hightower.

1. The Court below should have analyzed acts of the government taken *prior* to the incident to determine whether the government executed a policy or custom which inflicted the injury. The Court of Appeals, Tenth Circuit, in a case concerning whether a police chief should be liable for rights violations inflicted by his officers, agreed with other circuits that a cause of action under §1983 exists:

> "when the defendant was in a position of responsibility, knew or should have known of the [prior] misconduct, and yet failed to act to prevent future harm."

McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979), citing *Sims v. Adams*, 537 F.2d 829 (5th Cir 1976); *Wright v. McMann*, 460 F.2d 126 (2nd Cir.), cert. denied, 409 U.S. 885 (1972). A pattern or custom and accession to such custom by the government policymaker may be proved by prior incidents of abusive police conduct. *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161 (5th Cir. 1985). Additionally, where a police director should have known of an officer's dangerous propensities, he must be held liable in his official capacity. *Brandon v. Allen*, 516 F. Supp. 1355 (W.D. Tenn., W.D. 1981), *rev'd*, 719 F.2d 151 (6th Cir. 1983), *rev'd and remanded sub nom. Brandon v. Holt*, 105 S. Ct. 873 (1985). When knowledge that an officer has dangerous propensities is widespread among other officers, the officials "must understand that a threat to the safety of the community exists". *Id.* at 1360. Furthermore, even where there is no actual knowledge of particular acts, failure by policymakers to take action to stop certain behavior may constitute deliberate indifference

and liability may be found. *Reynolds v. Borough of Avalon*, 799 F. Supp. 442 (D.N.J. 1992).

Summary judgment is proper only if there exists no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). Under the standards of the above-cited cases, there were many material facts that raised issues of liability of the defendants Cobb County and Robert Hightower. The Court below, however, failed to analyze these facts in light of the law.

In the police department of Cobb County there was a policy or custom of ignoring dangerous propensities of certain officers including the defendant officers in this case. Both officers Halter and Soper were known for having violent propensities, and Soper had been written up for his problems. (Deposition Moody, Exhibit 000073, Deposition Soper, p. 18). Previous incidents of use of violence and firearms by the officers had been covered up or omitted from reports. (Deposition Campuzano, pp. 68, 71). Officer Halter's supervisors, Sgt. Soper and Capt. Turner, knew that Halter had a temper, especially around kids and that Halter could not relate to or handle kids and that he lost his temper around them. (Deposition Moody, Exhibit 000073, Deposition Soper, p. 18). Major Moody had written a report that she had grave questions about Soper's credibility and that Soper handled children poorly. (Deposition Moody, p. 32). The Plaintiff presented ample evidence of policy or custom of ignoring prior problems with police officers. Plaintiff also presented an Affidavit of Louis J. Reiter, an expert in police procedure, who concluded that the County's "custom and practice provides an environment where a police officer feels free to violate a persons constitutional rights without accountability and it fosters these types of incidents." (Affidavit Reiter, par. 7). Plaintiff's evidence tends to prove that the Defendants Cobb County and Robert

Hightower had a disposition to disregard life and safety of people, particularly children, in the community. This disregard was so prevalent as to be police policy or custom.

2. The Court below failed to analyze the non-action of the county immediately following the incident of police brutality, in direct conflict with other Courts of Appeals decisions. Plaintiff provided evidence that not only were prior incidents and violent propensities ignored by the defendants Cobb County and Robert Hightower, but the conduct of the police department after the Eldridge incident illustrates a policy and custom of lack of concern. A policymaker's disposition may be inferred from his conduct after the event occurred, and subsequent acceptance of police behavior tends to prove the policymaker's disposition and policy. *Grandstaff*, 767 F.2d at 171. And where no investigation or action is taken by the supervisor as a result of police department procedures or policy after an incident of violence occurs, that inaction is unjustified and the cause of plaintiff's injuries and damages. *Brandon v. Allen*, 516 F. Supp. at 1361. The events in this case provide ample facts to go to a jury for a determination of liability.

When Sgt. Soper arrived on the scene after the initial acts of brutality had occurred, Sgt. Soper hit David Eldridge, the victim, instead of Officer Halter in order to stop the yelling and screaming. (Deposition Moody, Exhibit p. 000072, Deposition Soper, p. 28). On Sgt. Soper's command, Eldridge was taken to the hospital by Halter, who had been out of control with anger at him and who had beat him. (Deposition Soper, p. 32). Sgt. Soper left the scene, went home and did not even write a report on his own use of violence. (Deposition Soper, p. 33). The witnesses' names were not taken nor were they interviewed. (Deposition Soper, p. 31). Additionally, the police made no photographs or diagrams nor was any investigation

done. Sgt. Soper made no investigation of the incident, and he never reviewed the reports of Halter, Campuzano or Woll. (Deposition Soper, pp. 40, 41).

Superior officers were told about the incident, but they did nothing and they did not report it to Internal Affairs. (Deposition Soper, p. 33).

Campuzano and Halter were together when writing their reports of the incident which on their face contain erroneous information, obvious omissions and contradictions and which were contradicted by them in their later statements to Moody. Fellow officers chided Halter for being too factual in his report. (Deposition Moody, Exhibit p.000058). Sgt. Stephens approved the officers' reports without any further investigation. (Deposition Soper, p. 33).

The inaction of the police department and failure to investigate both the incident and the police violence immediately following the incident clearly demonstrate a lack of concern for the safety and rights of the citizens of Cobb County. No investigation was done into the incident at all and no concern was voiced about the police officers' violence. This acceptance of violence and unconcern tends to prove the preexisting disposition and policy of Cobb County and Robert Hightower. Since that incident obtained so little attention and action by the policymaker, the jury at least should be given the chance to determine whether that inaction was accepted as the way things had been done in Cobb County.

3. The Court below also ignored the fact that a group of officers inflicted police brutality against David. The Court's analysis was in direct conflict with *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989). Where all the officers involved in an incident acted violently, then one can draw a reasonable inference that the officers operated under a shared set of rules and

customs. *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989). Such an event provides "some proof of the existence of the underlying policy or custom." *Id.* at 1157.

Plaintiff provided evidence that three officers struck David. First Officer Campuzano struck David numerous times. Then Officer Halter beat up David. Then Sgt. Soper struck David. Clearly under *Bordanaro*, this exhibition of police brutality raises the issue of whether Cobb County had a policy or custom of allowing such violence to occur in its department.

The Court below ignored these areas of analysis and made up its own standard of determining whether Cobb County had a policy or custom that caused the brutality. The Court below set a *subsequent investigation* standard. The Court found that the evidence showing Cobb County's investigation into the incident and its later disciplinary action was sufficient to overcome Plaintiff's showing. The Court ignored the standards in the Supreme Court cases of *Monell* and *City of Canton* and in numerous cases of other Courts of Appeals. The Court below ignored the fact that it was not until the Plaintiff brought the incident to Robert Hightower's attention that any investigation whatsoever was conducted. (Deposition Moody, pp. 29, 5, 6). Under established precedent, however, the late investigation is not sufficient to overcome the evidence of the county's disregard for life and safety of its citizens. The evidence Plaintiff presented clearly shows a policy or custom of deliberate indifference toward the rights of the citizens. The evidence should go to a jury. The motion for summary judgment should have been denied.

The Court below set a standard which is contra to and irreconcilable with prior decisions of this Court and Courts of Appeals. The lower court analyzed only subsequent action and ignored prior incidents and ignored evidence of a policy or

custom of deliberate indifference to police brutality. This Court should therefore review this case.

B. FAILURE TO ESTABLISH POLICIES

1. VISITORS IN POLICE CARS

The decision of the Court below is in direct conflict with this Court's decision in *Monell*. When execution of a government's policy or custom is the cause of unconstitutional action by its employees, then that governmental entity is responsible. *Monell v. Dept. of Social Services of the City of New York*, 98 S. Ct. 2018 (1978).

General Order 13,111,B sets out the rules for passengers riding in police cars. (Plaintiff's Request to Admit to Robert Hightower). It does not forbid relatives or girlfriends or boyfriends from riding with a police officer, although it clearly should. (Affidavit Reiter, paragraph 9). Cobb County allowed impermissible influences to impact on its officers by allowing such to occur.

Plaintiff presented facts showing that Campuzano's anger and rage at David Eldridge stemmed from the comments and influence of Campuzano's girlfriend who rode in his police car that evening. Angie found the ride with Campuzano "real boring and gave him a hard time about it". (Deposition Angie Campuzano, p. 9). When David left the party location, Angie told Campuzano "I can't believe he is leaving. Why is he leaving?" (Deposition Campuzano, p. 36). Campuzano's actions from the initial chase of David were caused by the feeling of embarrassment and inability caused in Campuzano by Angie's presence. Sgt. Soper stated that he would not have chased David but merely have impounded the jeep vehicle. (Deposition Moody, Exhibit p. 000082).

In his Affidavit, presented to the court by the Plaintiff, Louis J. Reiter stated: "There was a gross deviation from the ordinary standards of police departments in allowing Campuzano's girlfriend to ride with him. This fact may have provoked this incident." (Affidavit Reiter, par. 9).

Plaintiff therefore submitted evidence that Cobb County and Robert Hightower's policy or custom concerning visitors riding in police cars caused the constitutional violation. The Court below ignored this evidence in light of the precedent of *Monell*. This evidence should go to a jury.

2. TRANSPORTATION OF INJURED ACCUSED

Cobb County Police failed to have an affirmative policy as to the transportation of subjects after force has been used. The lack of any such policy led to the further violation of the constitutional rights of David Eldridge.

After David was beaten by Campuzano and Halter, and after Halter had demonstrated out-of-control anger toward David, Sgt. Soper nonetheless ordered Halter to take David to the hospital. David then suffered additional physical and emotional abuse by Halter at the hospital. (Deposition Moody, Exhibit pp. 000011, 000027-28).

As stated by Louis J. Reiter in his Affidavit, Cobb County grossly deviated from standard police practice by failing to have an affirmative policy or directive regarding how to handle transportation of a subject after the use of force. Failure to have such a policy and allowing an officer who has been involved in an altercation with the subject to transport the subject "almost certainly guarantees continued violations of the subject rights." (Affidavit Reiter, par. 11).

Cobb County did not have procedures dealing with police brutality, thereby showing a policy and custom of deliberate

indifference to police brutality which caused the constitutional violations of David's rights. The Court below failed to properly apply the standards set forth in *Monell* to the facts, and therefore the decision below is in direct and irreconcilable conflict with the Supreme Court case.

The issue should go to a jury for a determination of Cobb County and Hightower's liability.

C. FAILURE TO TRAIN

The decision of the Court below is in direct and irreconcilable conflict with this Court's decision in *City of Canton*. Where the failure to train police officers amounts to deliberate indifference to the rights of persons with whom the police come into contact, such inadequacy of training may serve as the basis for §1983 liability. *City of Canton, Ohio v. Harris*, 109 S. Ct. 1197 (1989). Where the municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of the citizens, such shortcoming is a policy or custom actionable under §1983. *Id.* at 1205. The failure to train must reflect a deliberate or conscious choice by the government. *Id.* In determining the inadequacy of training, the court looks at the duties assigned to special officers and the need for more or different training. *Id.* Where the training of officers was deficient, the jury was entitled to find a violation of the Plaintiff's constitutional rights. *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989).

Cobb County was clearly deficient in its training of the defendant officers in regards to teenage drinking parties. At the time of the incident, Cobb County was experiencing a large problem with such parties, and one child had been killed. A special task force was assembled to deal with these parties, and officers therein broke up the parties. Campuzano and Halter were still, however, breaking up several teenage parties each

week. They had not received any training whatsoever on handling such parties (Deposition Halter, pp. 16-18; Deposition Campuzano, pp. 18-19) whether in mandate training or roll-call training. Hightower testified there was no such training. (Deposition Hightower, p. 37).

Louis J. Reiter, an expert on police procedures, submitted an affidavit wherein he stated that the need for training regarding teenage drinking parties was obvious, given the existing situation in Cobb County. He stated that "[s]tandard police practice required such training for an agency confronted with repeated incidents such as these, and the failure to so train was a gross deviation from standard police practice generally." (Affidavit Reiter, par. 12).

The Court below in this case stated as follows:

> "Plaintiff has not demonstrated to this court a deliberate indifference to the needs of the citizens by merely alleging that special police training is necessary to respond to a string of teenage parties."

Order, 8a.

Petitioner shows that the lower court's decision in this case is in direct conflict with *City of Canton*. The court apparently did not analyze the special duties assigned to the special task force set up to deal with this very real and obvious problem which Cobb County was experiencing. Additionally, the Court ignored the apparent need for training in light of the county's history of problems with teen parties. By having Halter and Campuzano continuously breaking up teen parties even though they were not members of the task force set up specifically to deal with such teen parties and even though they received no instruction or training in this area, Cobb County evidenced a deliberate indifference to the rights of the

inhabitants. This is made even more blatant by the facts of Halter's known problems with children.

The case should therefore go to a jury for a determination of whether the county's failure to train its officers to deal with the numerous teen parties evidenced a deliberate indifference to the rights of Cobb County citizens. By granting summary judgment to Cobb County and Robert Hightower, the Court below ruled in direct conflict with decisions of this Court and of other Courts of Appeals.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BILL ELDRIDGE, Individually and as Administrator of the Estate of David Eldridge,	:	
Plaintiff,	:	CIVIL ACTION FILE NO. 1:90-CV-0169-JTC
v.	:	
E.A. CAMPUZANO; SCOTT HALTER; LARRY SOPER; LISA WOLL; COBB COUNTY, a political subdivision of the State of Georgia; and ROBERT HIGHTOWER, in his official capacity as Director of Public Safety, Cobb County, Georgia,	:	
Defendants.	:	

ORDER OF COURT

Presently before the court are defendants Larry Soper and Scott Halter, and E.A. Campuzano's motion for summary judgment. For the following reasons, defendant Cobb County and Robert Hightower's motion for summary judgment (#44) is GRANTED; defendant Larry Soper, Scott Halter and E.A. Campuzano's motion for summary judgment (#35) is GRANTED in part and DENIED in part.

I. Facts

This action was brought pursuant to 42 U.S.C. § 1983. Plaintiff asserts that the police were called to respond to a loud party. David Eldridge, a sixteen year old boy and his friend Jeff

Clark went to leave the party in David Eldridge's jeep. While in the jeep, Officer Campuzano asked for David Eldridge's license and registration which were returned to him. Thereafter, Officer Campuzano allegedly walked away, and David Eldridge drove off at normal speed with his lights on and Officer Campuzano and his girlfriend followed David with the police lights and siren on. Upon seeing the officer's lights and siren, David Eldridge allegedly panicked and a chase ensued, ending when David Eldridge hit a curb, blew out two tires and David Eldridge and Jeff Clark jumped out of the jeep to run.

Plaintiff asserts that Officer Campuzano shouted profanities and threats at David Eldridge. Plaintiff further asserts that David Eldridge tripped and stopped running. Officer Campuzano then allegedly hit David Eldridge twice in the face. Officer Campuzano handcuffed David Eldridge while shouting threats and he resisted the handcuffing. Officer Campuzano allegedly punched David Eldridge in the face again while officer Halter completed the handcuffing. After he was arrested and handcuffed, plaintiff alleges that Officer Halter struck David Eldridge over the head four times with his night stick, hit him in the stomach four times and kneed him in the back, knocked him down and hit him in the face after he was arrested and handcuffed. Officer Soper arrived thereafter and allegedly hit David Eldridge in the solar plexus with his flashlight.

Defendants Campuzano, Halter and Soper argue that David Eldridge fought with officers on March 11, 1989, when they placed him under arrest for fleeing and attempting to evade an officer, obstruction of an officer, traffic offenses and a minor in possession of alcohol charge.

On the night of the arrest, Officer Campuzano responded to a call concerning a loud party and upon arriving saw beer cans and a scurry of activity including David Eldridge and Jeff Clark in David's jeep. The officer wanted to determine whether David Eldridge had been drinking and competent to drive. Campuzano asserts that while he looked away to get an alco-sensor and to talk to Officer Halter, David Eldridge drove away fairly fast. Campuzano asserts that due to the party, beer cans, and David Eldridge's swift exit, he followed the jeep with his siren to investigate the situation, whereupon David Eldridge turned his car lights on and off to evade detection, accelerated his jeep and lead Campuzano on a chase through a residential neighborhood. David Eldridge lost control and the jeep tipped over.

After, defendant officers assert that David Eldridge ran into the woods and was ordered to stop. When Campuzano attempted to arrest David Eldridge, he fought with Campuzano and David Eldridge hit Campuzano with the handcuffs. Officer Halter asserts that when he arrived at the scene, David Eldridge was on top of Campuzano and was trying to get the officer's gun. Halter struck David Eldridge to get him off Campuzano and handcuffed him. David Eldridge and Officer Campuzano were both bleeding from the incident. Upon further resistance, defendant officers assert that they struck David Eldridge. Defendants Campuzano, Halter and Soper assert the defense of qualified immunity.

David Eldridge was taken to the hospital where he had a broken nose, 12 stitches and bruises. Officer Campuzano had cuts from being hit by the flying handcuff and being bit by David Eldridge when the officer allegedly put his hand in David's mouth.

David Eldridge had previously been diagnosed as having a tumor in his chest which was later determined to be malignant. Plaintiff asserts that the stress of the incident exacerbated the progress of David Eldridge's cancer. David Eldridge died on September 30, 1989. The juvenile charges against David Eldridge were dismissed.

II. Summary Judgment Standard

Rule 56(c), Fed. R. Civ. P., defines the standard for summary judgment: Courts should grant summary judgment when "there is no genuine issue as to any material fact...and the moving party is entitled to judgment as a matter of law." The general rule of summary judgment in the Eleventh Circuit states that the moving party must show the court that no genuine issue of material fact should be decided at trial. *Clark v. Coasts & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). "[U]nless the movant for summary judgment meets its burden under Rule 56, the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion." *Id.*

While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party, *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id.* at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. *Id.* at 248.

Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial. *Celoxtex Corp v. Catrett*, 477 U.S. 317, 325 (1986). In *Celoxtex*, the Supreme Court interpreted Rule 56(c) to require the moving party to demonstrate that the nonmoving party lacks evidence to support an essential element of its claim. Thus, the movant's burden is "discharged by showing — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case."

In either situation, only when the movant meets this burden, does the burden shift to the opposing party, who must then present evidence to establish the existence of a material issue of fact. *Id.* The nonmoving party must go beyond the pleadings and submit evidence in the form of affidavits, depositions, admissions and the like, to demonstrate that a genuine issue of material fact does exist. *Id.*

III. Defendants Cobb County and Robert Hightower's Motion for Summary Judgment

Plaintiff asserts a claim against defendants Cobb County and Robert Hightower for the alleged implementation of governmental policy. Specifically, plaintiff asserts that the precinct was not properly supervised pursuant to custom and rules by accepting police behavior that violated citizens' constitutional rights. In addition, Cobb County and Hightower lacked a policy to deal with visitors in police cars or officers tending toward violence or to direct the actions of officers after force has been used. Further, defendants failed to train officers to deal with teenage parties which was a problem in Cobb County.

Defendant Hightower is the director of the Cobb County Police Department and oversees the entire Police Department for Cobb County. Defendants, however, argue that there is no policy which would give rise to governmental liability. Defendants assert that although there may be a question concerning the precise actions of the officer defendants, excessive force, if any was used, to effect the arrest of David Eldridge was not pursuant to governmental policy. In fact, any maltreatment against David Eldridge after his arrest was contrary to governmental policy.

A municipality can be found liable under § 1983 only where a municipality itself causes the constitutional violation in question. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 1203 (1989) (citations omitted). "*Respondeat superior* or vicarious liability will not attach under § 1983. *Id.* (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)). "It is only when the 'execution of the government's policy or custom...inflicts the injury' that the municipality may be held liable under § 1983." *City of Canton, Ohio*, 109 S.Ct. at 1203 (quoting, *Springfield, Mass. v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J. dissenting)). The first question where municipal liability under § 1983 is alleged is whether there is "a direct causal link between a municipal policy or custom, and the alleged constitutional violation." *City of Canton, Ohio*, 109 S.Ct. at 1203. Thus, there must be 1) a policy 2) of the city's policymaker 3) that caused 4) plaintiff to be subjected to a deprivation of constitutional rights. *Grandstaff v. City of Borger, Texas*, 767 F.2d 161, 169 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987) (citing, *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978)) (other citations omitted).

Defendants assert that the relevant policies in Cobb County Police Department's Code of Conduct are as follows:

> 1.48– Officers shall not mistreat nor allow any other person to mistreat persons in their personal custody. They shall be handled in accordance with the law and Departmental General Orders.
>
> 1.49– Officers shall not use more force in any situation than is reasonable under the circumstances. Force shall be used in accordance with the law and Departmental General Orders.

Defendants argue that although proper policies and training existed, and defendant officers understood the policies, the officers ignored the policies and reacted according to anger. *Soper. p. 29; Halter Depo., p. 42-46.* Thus, defendants argue that the officers' behavior was the result of anger and excitement and not in accordance with official policy and training.

Plaintiff asserts that defendants failed to supervise defendant officers and did not properly investigate acts of violence by police officers. However, defendant Hightower, conducted an investigation and took corrective action once the incident was made known to him. In addition, two other recent questionable incidents involving the defendant officers were discovered in this investigation. Ultimately, the three officers were terminated. This is evidence that the government did in fact investigate and take action against defendant officers, contrary to plaintiff's assertions. Plaintiffs have not shown a policy or custom of ignoring improper police behavior or failing to supervise officers.

In addition, plaintiff asserts that the government has a duty to establish a policy concerning visitors in police cars and for situations after police violence has occurred. However, plaintiff has put forth no evidence that such a custom, if in fact not having such specific policies constitutes a custom, inflicted injury in this case. Merely asserting that an officer involved in a

policy brutality incident who takes the injured party to the hospital, violates a persons constitutional rights is insufficient. There is no evidence of the necessary causal link between the lack of a policy or custom and the alleged constitutional violations in this case.

In addition, plaintiff asserts that a failure to properly train defendant-officers in the area of teenage parties caused the alleged constitutional violations in this case because of the rampant number of such parties in the county. "There are limited circumstances in which an allegation of 'failure to train' can be the basis for liability under § 1983." *City of Canton, Ohio*, 109 S.Ct. 1197, 1204 (1989). "[I]nadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* "Only where a failure to train reflects a "deliberate' or 'conscious' choice by a municipality — a 'policy' as defined by our prior cases — can a city be liable for such a failure under § 1983." *Id.* at 1205. However, "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitution rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.*

Asserting that the county needs to train police officers concerning how to handle teenage parties is not "obvious" to this court, nor is it clear that a lack of training in this specific area will likely result in the violation of constitutional rights. Plaintiff has not demonstrated to this court a deliberate indifference to the needs of the citizens by merely alleging that special police training is necessary to respond to a string of teenage parties.

The court has found that defendants Hightower and Cobb County have not caused the alleged constitutional violations, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), nor did the execution of a governmental policy inflict the injury. Defendants Hightower and Cobb County may not be held liable under § 1983. Accordingly, the court hereby GRANTS defendant Hightower and Cobb County's motion for summary judgment.

IV. Defendants Larry Soper, Scott Halter and E.A. Campuzano's Motion for Summary Judgment

Officers Campuzano, Halter and Soper assert the defense of qualified immunity as to plaintiff's claims under § 1983. Plaintiff alleges a violation of Fourth Amendment and Eighth Amendment rights by the police officers' use of excessive force in the arrest of David Eldridge.

"[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity balances conflicting concerns. It acknowledges the importance of responding to constitutional violations yet recognizes that "claims frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to society as a whole." *Id.* at 814. Social costs include the expense of a lawsuit, diversion of official energy from important public problems, and the deterrence of qualified persons from accepting public office. Further, a fear of being sued may weaken the spirit of public officials. *Id.*

When defendants assert the defense of qualified immunity, a district court must determine whether, accepting plaintiff's

allegations of fact as true, defendants have violated clearly established law. *Green v. Brantley*, 895 F.2d 1387 (11th Cir. 1990) (Kravitch J., concurring), *vacated, reh. en banc*, 921 F.2d 1124 (11th Cir. 1990); *Horlock v. Georgia Dept. of Human Resources*, 890 F.2d 388, 392-93 (11th Cir. 1989), *vacated*, 1990 U.S. App. LEXIS 1498 (11th Cir. 1990); *Rich v. Dollar*, 841 F.2d 1558, 1561 (11th Cir. 1988); *Goddard v. Urrea*, 847 F.2d 765, 769 (11th Cir. 1988) (Johnson, J., dissenting). *But see Peppers v. Coates*, 887 F.2d 1493, 1496-97 & n.7 (11th Cir. 1989).

Qualified immunity turns on a question of law. *Mitchell v. Forsyth*, 472 U.S. 511 (1987). Whether the claimed right "is clearly established is a question of law for the court to decide." *Andreu v. Sapp*, 919 F.2d 637, 641 (11th Cir. 1990). To avoid summary judgment, plaintiff must demonstrate that defendants are not entitled to qualified immunity legally, or that genuine issues of material fact exist concerning defendants' conduct as being violative of the clearly established law governing the case. *Courson v. McMillian*, No. 90-3400, slip op. 4882 (11th Cir. Aug. 30, 1991).

In determining whether plaintiff has asserted the deprivation of a clearly established right, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A reasonable public official must understand that the specific action he is taking violates the law. *Id.*

The Eleventh Circuit has developed a two part test to determine whether the qualified immunity defense applies. Courson, No 90-3400, slip op. at 4891 (citations omitted). First, defendant public official must prove that he acted within the scope of his discretionary authority when the alleged wrongful acts occurred. *Id.* A government official acts within his

discretionary authority when "objective circumstances compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." Rich, 841 F.2d at 1564 (quoting *Barker v. Norman*, 651 F.2d 1107, 1121 (5th Cir. Unit A July 1981)); *Hutton*, 919 F.2d at 1537.

Second, once defendant public official satisfies his burden of moving forward with the evidence, plaintiff must demonstrate a lack of good faith by defendants by showing that defendant public official's actions violated clearly established constitutional law. *Courson*, No. 90-3400, slip op. at 4891 (citing, *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988); *Hutton v. Strickland*, 191 F.2d 1531, 1536 (11th Cir. 1990)). "To defeat a qualified immunity defense, plaintiff bears the burden of showing that "the legal norms allegedly violated by the defendants were clearly established at the time of the challenged actions or, ... the law clearly proscribed the actions the defendant ... took."' *Barts v. Joyner*, 865 F.2d 1187, 1190 (11th Cir. 1989) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)), *cert. denied*, _____ U.S. _____, 110 S. Ct. 101 (1989). To be clearly established, the right allegedly violated must "be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Thus, qualified immunity may be applied when the law allegedly violated is not clearly established or when the law is clearly established and the court decides that the official's behavior did not violate any right accorded to plaintiff under clearly established law. *Courson*, No. 90-3400 slip op. at 4892 & n.14 (citations omitted). Next, the court must establish whether there is a genuine issue of fact concerning the government official's behavior being in violation of clearly established law. *Id.* at 4892.

It is not disputed that defendant officers were acting in their discretionary authority on the night of David Eldridge's arrest. Therefore, the next inquiry is whether the law allegedly violated was clearly established or whether clearly established law clearly proscribed defendants actions.

"In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1870 (1989). In most cases, that claim will be either the Fourth Amendment which prohibits unreasonable seizures of the person or the Eighth Amendment which prohibits cruel and unusual punishment. *Id.* A claim that a police officer used excessive force in the course of an arrest or an investigatory stop are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1867 (1989). After conviction, the Eighth Amendment is the primary source of substantive protection where the deliberate use of force is challenged as excessive and unnecessary. *Id.* at 1871 n.10 (citing, *Whitley v. Albers*, 475 U.S. at 327). Thus, although plaintiff claims a violation of the Fourth and Eighth Amendments as the constitutional rights allegedly infringed, the court finds the Fourth Amendment, only, as the source of substantive rights for plaintiff's claim under § 1983. Thus, defendants' motion for summary judgment is GRANTED as to plaintiff's Eighth Amendment claims under § 1983.

The next question is whether the force used by defendant officers was reasonable under the Fourth Amendment. A court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 1871 (citing, *Tennessee v. Garner*, 471 U.S. 1,8 (1985)). The test of reasonableness depends on the facts of each case; the court

should consider the facts from the perspective of a reasonable officer on the scene, and not with the benefits of hindsight. *Id.* at 1872. In addition, the reasonableness inquiry is an objective one and does not depend on an officer's intentions. *Id.*

Defendants assert that the situation involved a DUI investigation, a refusal to stop while being chased by police, speeding, a car out of control and resisting arrest. Further, defendants assert that they only used force necessary to effectuate the arrest. However, after David Eldridge was arrested and handcuffed, plaintiff asserts and defendants concede that he was slapped, pushed on the ground, hit in the stomach with a flashlight and kneed in the side. The officers admit that this behavior was the result of anger and poor judgment and assert that it was to regain control of the situation despite the fact that David Eldridge was already handcuffed. *See Halter Depo.* at 42-26; *Soper Depo.* at 28-30.

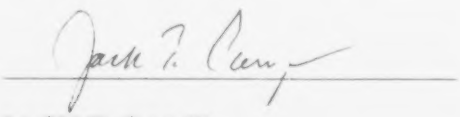
The court finds that defendants violated clearly established law by using excessive force on David Eldridge once he was arrested and handcuffed. Defendants actions were unreasonable in light of the circumstances — David Eldridge was arrested and handcuffed and was not found to be an immediate threat to the officers. The officers continued to assert force after arrest and restraint by handcuffs. The officers concede that they acted upon their emotions, specifically anger, and not upon their reason. As a result, the defense of qualified immunity does not apply, and defendants Campuzano, Halter and Soper's motion for summary judgment as to plaintiff's Fourth Amendment claim under § 1983 is DENIED.

V. Conclusion

For the foregoing reasons, defendant Hightower and Cobb County's motion for summary judgment as to plaintiff's § 1983 claims is GRANTED; defendant Campuzano, Soper and

Halter's motion for summary judgment as to plaintiff's Eighth Amendment claims under § 1983 is GRANTED; defendant Campuzano, Soper and Halter's motion for summary judgment as to plaintiff's Fourth Amendment claims under § 1983 is DENIED.

SO ORDERED, this 27 day of Sept., 1991.



JACK T. CAMP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BILL ELDRIDGE, Individually and as Administrator of the Estate of David Eldridge,	:	
Plaintiff,	:	CIVIL ACTION FILE NO. 1:90-CV-0169-JTC
v.	:	
E.A. CAMPUZANO; SCOTT HALTER; LARRY SOPER; LISA WOLL; COBB COUNTY, a political subdivision of the State of Georgia; and ROBERT , HIGHTOWER in his official capacity as Director of Public Safety, Cobb County, Georgia,	:	
Defendants.	:	

ORDER OF COURT

Presently before the court are plaintiff's motion to amend the order granting summary judgment (#52); plaintiff's motion for reconsideration (#53); defendants Cobb County and Robert Hightower's motion to amend order granting defendants' motion for summary judgment (#54); and defendants E.A. Campuzano, Scott Halter and Larry Soper's motion for reconsideration (#55). For the following reasons, plaintiff's motion to amend is DENIED; plaintiff's motion for reconsideration is DENIED; defendants Cobb County and Robert Hightower's motion to amend is GRANTED; defendants Campuzano, Halter and Soper's motion for reconsideration is DENIED.

I. BACKGROUND

This action was brought pursuant to 42 U.S.C. § 1983. In an order entered on September 30, 1991, this court granted defendants Cobb County and Robert Hightower's motion for summary judgment, and granted in part and denied in part defendants Soper, Halter and Campuzano's motion for summary judgment.

The court determined that defendants Hightower and Cobb County did not cause the alleged constitutional violations nor did the execution of a governmental policy inflict the injury. Further, although plaintiff claimed a violation of the Fourth and Eighth Amendments, the count found the Fourth Amendment, only, as the source of substantive rights for plaintiff's claim under § 1983. However, as to plaintiff's Fourth Amendment claim against defendants Campuzano, Halter and Soper, assuming plaintiff's version of the facts to be true, the court determined that defendants violated clearly established law by using excessive force on David Eldridge and defendants actions were unreasonable in light of the circumstances. Thus, the defense of qualified immunity did not apply.

II. PLAINTIFF'S MOTION TO AMEND ORDER AND DEFENDANTS' MOTION TO AMEND ORDER

Plaintiff asks that the order entered on September 30, 1991 be amended to include the statement prescribed by 28 U.S.C. § 1292 (b) so that plaintiff may petition for permission to appeal. Plaintiff argues that the court overlooked facts in the record which require an opposite result than that rendered by the court. In addition, plaintiff argues that an appeal would advance the ultimate termination of the litigation, and a trial of the remaining defendants without an appeal may be futile as a subsequent trial and settlement may ensue.

Defendants Hightower and Cobb County agree that it is the proper time for plaintiff to appeal. However, defendants argue that plaintiff should pursue an appeal pursuant to Fed. R. Civ. P. 54(b). Accordingly, defendants ask that the court amend its order to include a finding that there is no just reason for delay and direct that a final judgment be entered as to Cobb County and Robert Hightower pursuant to Fed. R. Civ. P. 54(b).

A. Interlocutory Appeal

Plaintiff requests that the court certify the issue for interlocutory appeal under 28 U.S.C. § 1292. Under this statute, the district judge may permit an interlocutory appeal under certain circumstances, where the order is not otherwise appealable. The order must involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292. "Certification is limited to extraordinary cases where early appellate review might avoid protracted and expensive litigation. It is not intended as a vehicle to provide early review to difficult rulings ... Nor is it appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts." *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364, 366 (S.D.N.Y. 1982). This section is to be used sparingly by the district courts. *Garner v. Wolfinbarger*, 433 F.2d 117, 120 (5th Cir. 1970).

The court finds that the question is inappropriate for interlocutory appeal. First, the question lacks a "substantial ground for difference of opinion" as required by the statute. The court interprets plaintiff's disagreements with it as disagreements over proper application of the law to the facts, rather than an unsettled question of law. Further, the court finds that an immediate appeal from the order will not materi-

ally advance the ultimate determination of the litigation. Accordingly, plaintiff's motion to amend is DENIED.

B. Fed. R. Civ. P. 54(b)

Defendants Hightower and Cobb County argue that the appropriate means to permit plaintiff to appeal is to amend this court's order to state that there is no just reason for delay and direct the entry of judgment.

Fed. R. Civ. P. 54(b) provides that the court may enter final judgment as to "one or more but fewer than all of the claims or parties" upon a determination that there is no just reason for delay and upon express direction for the entry of judgment. A motion for entry of judgment pursuant to Fed. R. Div. P. 54(b) is within the discretion of the trial court and is reviewed under the abuse of discretion standard. *Sears Roebuck & Company v. Mackey*, 351 U.S. 427 (1956).

The court agrees with defendants Hightower and Cobb County that an amendment to the court's order pursuant to Fed. R. Civ. P. 54(b) is proper in this instance. Summary judgment has been entered in favor of these defendants and the court considers these parties to no longer be a part of this case. The court finds no just reason for delay and DIRECTS that judgment be entered as to defendants Hightower and Cobb County pursuant to Fed. R. Civ. P. 54(b). Accordingly, defendants' motion to amend is GRANTED.

III. PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff moves for reconsideration of the court's grant of summary judgment in favor of defendants' Robert Hightower and Cobb County. Plaintiff asserts that the court has overlooked facts in the record and applicable law. Plaintiff asserted a claim against defendant Cobb County and Hightower for the

alleged implementation of governmental policy. Specifically, plaintiff claimed that the precinct was not properly supervised pursuant to custom and rules which accepted police behavior that violated citizens' constitutional rights. In addition, plaintiff claimed that defendants lacked a policy to deal with visitors in police cars, officers tending toward violence or to direct the action of officers after force has been used. Further, plaintiff asserted that defendants failed to train officers to deal with teenage parties which was a problem in Cobb County.

In its order entered on September 30, 1991, the court found that plaintiff did not show a policy or custom of ignoring improper police behavior or failing to supervise officers, and there was no evidence of the necessary causal link between the lack of a policy or custom and the alleged constitutional violations. Further, plaintiff had not shown that there was a deliberate indifference to the needs of citizens by merely alleging that special police training for teenage parties is necessary. After a careful review of the record, the court concluded that plaintiff did not demonstrate that defendants have caused the alleged constitutional violations or that the execution of a governmental policy inflicted the alleged injury.

In the motion for reconsideration, plaintiff reasserts that it was the custom and policy in the Cobb County Police Department to cover up all incidents, and there was a causal relationship between the failure of the County to have a policy of visitors riding in automobiles and the event in question. Further, plaintiff argues that the court did not address plaintiff's assertion that there is no policy to deal with police officers who show tendencies toward violence, and the court overlooked alleged violations that occurred to plaintiff at the hospital which was the result of policy and custom.

A Motion for Reconsideration should be filed only when, after careful consideration, it is deemed "absolutely necessary" by the movant. Local Rule 220-6. Such a motion may not be employed as a vehicle to tender new legal theories or to introduce new evidence that could have been presented in conjunction with the previously filed motion or response. Rather, Motions for Reconsideration serve the limited purpose of correcting manifest errors of law or fact, or in certain instances, calling newly discovered evidence to the Court's attention. Thus, the Court is most willing to reconsider a prior ruling on an issue in the face of new Eleventh Circuit or Supreme Court authority. Additionally, the court would be willing to correct a legal or factual error where that error was made despite a clear presentation of the issue by the party seeking reconsideration. Finally, the Court will consider a legal theory not previously presented upon a showing that the theory was unavailable to the movant at the time of the original filing.

The arguments put forth by plaintiff in this motion for reconsideration concern issues of law and fact that were carefully considered by the court in ruling on defendants Hightower and Cobb County's motion for summary judgment. The court finds that its ruling was correct in all respects. Further, plaintiff has not shown that it has met the standard enunciated above for a motion for reconsideration. Accordingly, plaintiff's motion for reconsideration is DENIED.

IV. DEFENDANTS' MOTION FOR RECONSIDERATION

Defendants Campuzano, Halter and Soper ask this court to reconsider its order entered on September 30, 1991 denying their motion for summary judgment. Defendants argue that the force used by Officer Campuzano in effecting the arrest of David Eldridge and initially handcuffing him was objectively

reasonable in light of all the facts and circumstances surrounding Officer Campuzano. Officer Campuzano now claims that he exerted no force on David Eldridge once the arrest was effected and David Eldridge had been handcuffed, and the only force against David Eldridge was by Officers Halter and Soper.

In its order entered on September 30, 1991, the court accepted plaintiff's facts as true for ruling on the issue of qualified immunity, which were that after David Eldridge was handcuffed, David Eldridge was slapped, pushed on the ground, hit in the stomach with a flashlight and kneed in the side. The officers admitted that his behavior was the result of anger and poor judgment and was done to regain control of the situation, even after David Eldridge was handcuffed. The court ruled that defendants violated clearly established law by using excessive force on David Eldridge once he was handcuffed and defendants actions were unreasonable in light of the circumstances.

In the motion for summary judgment, defendants' did not raise and the court did not consider a distinction among defendants and their behavior toward David Eldridge. The court looked at the totality of the circumstances and plaintiff's allegations in rendering its decision. The fact that the court cited to defendants Halter and Soper's use of force after David Eldridge was handcuffed merely demonstrates that the court believed defendants actions violated clearly established law by using excessive force. Defendants cannot now raise such an argument in a motion for reconsideration. Further, defendants did not present any evidence concerning defendant Campuzano's behavior while the other officers continued to use force on David Eldridge. Accordingly, defendants' motion for reconsideration is DENIED.

Defendants additionally argue that because this court focused on the use of excessive force after defendants handcuffed and arrested David Eldridge, this is a Fourteenth Amendment challenge instead of a Fourth Amendment claim and the standards are different. In its order the court focused on the actions of defendants after David Eldridge was handcuffed. The court relied on defendants' assertion that at that time David Eldridge was arrested and handcuffed to demonstrate that defendants used excessive force once David Eldridge was physically constrained by handcuffs and to rebut defendants' assertion that such force was necessary for their safety. The court did not intend to demarcate the time of arrest and the behavior of defendants in the course of arrest.

The court viewed the occurrences surrounding the handcuffing, as continuous events. Defendants' actions were pursuant to the arrest of David Eldridge and properly analyzed under the Fourth Amendment. "All claims of excessive force against law enforcement officers 'in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard.'" *Ortega v. Schramm*, 922 F.2d 684, 694 (11th Cir. 1991) (citing *Graham v. Conner*, 490 U.S. 384 (1989), rejecting analysis for such claims under a more generalized substantive due process approach). Accordingly, defendants' motion for reconsideration is DENIED.

V. CONCLUSION

For the reasons stated above, plaintiff's motion to amend (#52) is DENIED; defendant Hightower and Cobb County's motion to amend (#54) is GRANTED; plaintiff's motion for reconsideration (#53) is DENIED; and defendants' motion for reconsideration (#55) is DENIED. The Pretrial Order is due 6/30/92.

SO ORDERED, this 11 day of May, 1992.

Jack T. Camp

JACK T. CAMP
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8519

Non-Argument Calendar

D.C. Docket No. 1:90-cv-169

BILL NMI ELDRIDGE, Individually and as Administrator of the Estate of David Eldridge,	: Plaintiff-Appellant,
v.	
E.A. CAMPUZANO; SCOTT HALTER; LARRY SOPER;	: Defendants,
COBB COUNTY, a political subdivision of the State of Georgia; ROBERT HIGHTOWER, in his official capacity as Director of Public Safety, Cobb County, Georgia,	: Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(February 19, 1993)

Before KRAVITCH and BIRCH, Circuit Judges and HILL, Senior Circuit Judge.

PER CURIAM: Affirmed. See 11th Cir. 36-1.
"Costs taxed against plaintiff-appellant."

Judgment Entered: February 19, 1993
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk
Atlanta, Georgia

By: _____
Deputy Clerk

ISSUED AS MANDATE: May 12, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 92-8519

BILL NMI ELDRIDGE, Individually and as Administrator of the Estate of David Eldridge,	:	Plaintiff-Appellant,
v.	:	
E.A. CAMPUZANO; SCOTT HALTER; LARRY SOPER;	:	Defendants,
COBB COUNTY, a political subdivision of the State of Georgia; ROBERT HIGHTOWER, in his official capacity as Director of Public Safety, Cobb County, Georgia,	:	Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING

BEFORE: KRAVITCH and BIRCH, Circuit Judges and HILL, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant David Eldridge, is denied.

ENTERED FOR THE COURT:

Phyllis Kravitch

United States Circuit Judge

ORD-41

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV. Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
AUG 5 1993
OFFICE OF THE

NO. 93-49

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

BILL ELDRIDGE,
Petitioner,

v.

COBB COUNTY, a political subdivision of the State of Georgia, and ROBERT HIGHTOWER, in his official capacity as Director of Public Safety, Cobb County, Georgia,
Respondents,

and E.A. CAMPUZANO, SCOTT HALTER, and LARRY SOPER,
Additional defendants in the District Court.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KRIS SKAAR
(COUNSEL OF RECORD
FOR RESPONDENTS)
ROBERT F. WEBB
(APPLICATION PENDING)
242 LAWRENCE STREET
MARIETTA, GEORGIA 30060
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court should grant certiorari in this case of alleged excessive force in effecting an otherwise lawful arrest to review a decision finding a local government and a policy making official not liable where the evidence showed that proper policies, training and supervision were in place prior to and following an isolated incident of alleged excessive force.

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NO. 93-49

THE SUPREME COURT OF THE UNITED STATES

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BILL ELDRIDGE,
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COBB COUNTY, a political subdivision of the State of Georgia, and ROBERT HIGHTOWER, in his official capacity as Director of Public Safety, Cobb County, Georgia,
Respondents,

and E.A. CAMPUZANO, SCOTT HALTER, and LARRY SOPER,
Additional defendants in the District Court.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents in the above-styled action respectfully oppose the Peititon for Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit. Respondents show that the Courts below properly applied the precedent of

this Court to determine that there was no liability on Cobb County and Director Hightower. The law was properly applied, and this case offers this Court no opportunity to correct any conflict among the circuits. Accordingly, Respondents respectfully request that the petition be denied.

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the trial court without opinion is noted at Eldridge v. Campuzano, 986 F.2d 507 (11th Cir. 1993). A copy of said decision appears at Appendix, p. 25a.

The decision of the Court of Appeals dening petitioner's motion for rehearing has apparently not yet been noted in a published report. A copy of said denial appears at Appendix, p. 26a.

The Orders of the U.S. District Court, N.D.Ga., granting respondents' motion for summary judgment and entering final judgment pursuant to Fed.R.Civ.P. 54(b) have not been published. Copies of said Order appear at

Appendix, pp. 1a-14a & pp. 15a-23a, respectively.

STATEMENT OF THE CASE

I. Policy and training.

The Code of Conduct of the Cobb County Police Department implements the formal policy of the County. With regard to the matters in issue in this case, the Code of Conduct provides as follows:

1.48 TREATMENT OF PERSON IN CUSTODY

Officers shall not mistreat nor allow any other person to mistreat persons in their personal custody. They shall be handled in accordance with the law and Departmental General Orders.

1.49 USE OF FORCE

Officers shall not use more force in any situation than is reasonable under the circumstances. Force shall be used in accordance with the law and Departmental General Orders.

Director Hightower testified to a nineteen-year history of strict discipline for officers that engaged in misconduct such as that alleged in this case.

> [A]ny time an arrest has been made and the Defendant is in handcuffs, there is no more force. . . . [I]f there has been one consistent result of discipline over the 19 years that I've been here, it is that anybody who is mistreating a prisoner in handcuffs has been summarily terminated.

The clear factual material of record shows that all Cobb County Police Officers receive proper training in the basic police skills necessary to handle their assignments - including responding to "loud party" calls. Director Hightower specifically testified that responding to "loud party" calls "is all a part of the overall training" and that "it does not require a specific seminar entitled how to enforce laws pertaining to teenage drinking parties."

The record shows that prior to the Internal Affairs investigation of the underlying incident, the policy makers were unaware of any prior incidents of misconduct or

"violent propensities." There is no evidence of any such actual or constructive knowledge. Much less is there any evidence that such knowledge was "widespread."

II. The incident of March 11, 1989.

In March of 1989, petitioner's son David Eldridge was a high school junior. On March 11, 1989, David attended a party in unincorporated Cobb County where he and other teenagers were consuming alcoholic beverages. David drove to the party with his friend Jeff Clark and their dates. David had already consumed alcohol prior to arriving at the party, and David continued to drink alcoholic beverages while at the party.

Officer E.A. Campuzano responded as backup to the site of the party in response to a "loud party" complaint. That evening, Officer Campuzano was accompanied by Angie Maddox.[1] Ms. Maddox was the secretary to Judge Carlisle of the Cobb County State Court. Cobb County Police Department General Order 13 III B makes provision for allowing court personnel, reporters and certain other individuals, to

---

[1] At that time, Officer Campuzano was dating Ms. Maddox. Subsequent to these events, Campuzano and Maddox married.

accompany officers with the permission of supervisors. This ride was authorized by CCPD policy and by Officer Campanzo's supervisor.

David had been at the party for approximately one hour when someone announced that the police were coming. The result was a "stampede" of the approximately forty party-goers from the house. Officer Campuzano arrived to see, in his own words, "a whole bunch of kids running up and down the street, beer cans laying in the street all over the place." David and his friend Jeff decided to get the jeep that David had driven to the party and circle back to pick up their dates.

Once David and Jeff reached the jeep, Officer Campuzano approached them.[2] Officer Campuzano investigated to see if David and Jeff had been drinking and were about to drive off. Officer Campuzano asked to see identification and proof of motor vehicle insurance. Suspecting that they had been drinking at the party, Officer Campuzano told David and Jeff

---

[2] There are some differences in the accounts of the incident given on deposition by Clark and Campuzano. However, these variations are minor and are immaterial for the purpose of determining the liability of the policy making respondents. Additionally, petitioner made no claim below that the initial interaction between David and any Cobb County Police Officer was improper.

that he would have to give them an alco-sensor test.[3]

When Officer Campuzano returned to his patrol car to get the alco-sensor, David sped off. While the parties may differ on some immaterial elements of this initial contact, it is clear that David and his passenger left the scene and that the police pursued them by car. District Court Order at Appendix, pp. 1a-3a. Officer Campuzano used his siren and flashing blue lights to indicate that David should stop.

At this point, in the words of David's companion Jeff, David had "panicked" and was "out of control." Instead of circling back for their dates as planned; David sped out of the residential subdivision where the party had been, and stranded both his and Jeff's date at the site of the party. After speeding out of the residential area were the party had been, David turned into another residential subdivision. In an effort to escape from the police, David turned his automobile's lights off. David continued to speed, even though according to his passenger, David could not see. On deposition, David's passenger Jeff testified that David's driving scared him so

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[3] An "alco-sensor" is a hand-held electronic device which is used to determine if the tested individual has consumed alcohol recently.

badly that he considered jumping from the moving vehicle. Jeff stated that all during this time, he was shouting at David to pull over and that David ignored this reasonable request.

David never voluntarily brought the vehicle to a stop. In the words of his frightened passenger, as David sped through a residential subdivision (turning his lights off intermittently), David came "up to a four way stop and a car -- I think a car was pulling out, and David swerved to miss or he tried to take a right there; and the car skidded into the side of the curb." As a result, both tires on the driver's side of the vehicle blew out and the jeep turned over on its side.

Even then, David did not stop. David began to flee on foot. David and Jeff ran behind nearby houses and into a wooded area. Officer Campuzano pursued David on foot. When Officer Campuzano finally caught up with David and attempted to place him under arrest, a lengthy struggle began between the two.

In time, Officer Halter and Soper located David and Officer Campuzano in the woods and arrived on the scene. Both Halter and Soper were extremely worried and in a very excited state due to having lost contact with Officer Campuzano during Campuzano's foot pursuit and hand-to-hand struggle with David Eldridge.

Although there is some degree of disagreement as to exactly what happened at the scene of the struggle; the evidence indicates that David was struck in violation of Cobb County policy.

It is clear from the deposition testimony of the individual officer-defendants that any abuse was not pursuant to policy or training. This fact clearly appears from the deposition testimony of Soper:

> Q: What had you been trained to do to subdue a situation like that where you've got a police officer and a suspect yelling at each other? What has your training taught you that you were supposed to do?
>
> A: Well, my training went out the window that night.
>
> Q: . . . [W]hat are you supposed to do in that kind of situation?
>
> A: You're supposed to hold your cool and take the guy into custody.

(emphasis added). By his response, Soper clearly shows that proper policy and training was in place, and that the instant incident arose not because of improper policy or training, but because of the excitement of the moment. Soper explained that "I [Soper] was mad that Eddie [Officer Campuzano] was laying

there hurt. He had been lost for 15 minutes." Officers Halter and Campuzano offered similar explanations for their conduct. The incident, and especially the possibility that Officer Campuzano had been seriously hurt, caused the emotions of the officers to run high. In fact, months later, the deposition of Office Halter had to be briefly recessed because of the continuing emotional effect on Officer Halter.

Petitioner's contention that "the entire chain of command of the precinct had covered up the incident" is entirely false and is supported by no evidence. Petition for Writ of Certiorari, p. 6 [hereinafter "Petition"]. The individual officers who had violated their training and Cobb County policy, intentionally concealed the incident from the chain of command. See Petition, p. 6 ("Soper did not write a report that he had struck David."). The record cite provided by petitioner to support this claim is the deposition of defendant Soper, where he testified that he told his superiors that "I [Soper] don't really know what happened out there yet . . . I really don't know anything." There is absolutely no evidence of a supervisory cover up. The evidence shows that the officers involved knew that they had violated policy, and that they concealed the fact in an unsuccessful effort to avoid the consequenced that they knew would

surely follow. When petitioner's complaint came to the attention of Director Hightower, an investigation was commenced immediately.

III. Cobb County and Director Hightower's response to the incident.

Upon receiving a complaint, Cobb County conducted a thorough Internal Affairs investigation which unearthed previously unknown information regarding the officers. The Internal Affairs investigation uncovered two prior incidents in which two of the officers had drawn their weapons without completing proper documentation. These incidents (which occurred in the few weeks preceding the March 1989 incident) were not known prior to this investigation. As a result of the investigation, Campuzano, Halter and Soper were determined to have violated Cobb County policy and each was terminated.

There is no evidence to support petitioner's contention that any of the involved officer's had "violent propensities" which were previously known to the chain of command. Petition for Writ of Certiorari, p. 7. Petitioner's supporting citation for this proposition is to Maj. Moody's deposition, Ex. p. 73. This Exhibit is a statement given by Soper to Internal Affairs. Soper's statement

shows clearly that these allegations were not known to their precinct superiors, much less to Director Hightower.

While there may be some question as to the exact actions of the individual officer-defendants, it is clear that any excessive force applied to effect the arrest of David Eldridge was not pursuant to governmental policy. It is especially clear that any maltreatment of David after his arrest was directly contrary to governmental policy.

SUMMARY OF ARGUMENT

There are no special and important reasons for granting the petition for a writ of certiorari. U.S.Sup.Ct.R. 10. Both Courts below faithfully applied this Court's controlling precedent by summarily holding that the County and Director Hightower were not liable. City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); Monell v. New York Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). There is no conflict between the circuits that can be resolved on the facts of this case. Petitioner has not pointed out to the Court any genuine conflict between the circuits. Indeed, there is no error of any kind.

ARGUMENT

I. Petitioner's "failure to supervise" theory does not merit review by this Court.

A. Petitioner's contentions - generally.

Petitioner mischaracterizes the District Court's ruling as adopting what petitioner terms a "'subsequent investigation' standard." Petition, p. 9. Petitioner then argues that there is a conflict between the circuits based upon his intentional miscontruction of the decisions below, as well as the precdent of other circuits. Apparently, petitioner interprets the holding below as being that

> With regard to Plaintiff's claim that the Defendants failed to supervise and investigate former acts of violence, the Court below . . . applied a subsequent investigation standard, stating that since the government did investigate and take action against the officers, after the incident occurred, then there was no showing of a policy or custom of

ignoring imporper police behavior or failing to supervise officers.

Petition, p. 9.

Petitioner apparently wants this Court to review this case to determine whether a subsequent investigation alone will sufficiently show a governmental policy. This issue is not presented to the Court on the facts of this case because of the abundance of uncontradicted evidence that proper policy, supervision and training were in place prior to the March 1989 incident. Director Hightower testified to a nineteen year history of proper training and strict discipline. The "subsequent investigation" conducted by the Cobb County Police Department was a natural continuation of this history of implementing constitutionally correct policies. Notwithstanding the unrebutted evidence refuting liability, petitioner urges that the Courts below erred in its analysis of petitioner's "pre-incident," "post-incident," and "group action" theories. Petition, p. 9.

B. No "pre-incident" evidence supports petitioner's claim.

Respondents agree with petitioner that supervisory liability may attach in some circumstances were policy makers know of

misconduct and take no corrective action. Petition, p. 10. However, the record in this case is totally devoid of any evidence to support such liability. When the evidence of misconduct became known, corrective action was swift and certain. The alleged "prior incidents" and "violent propensities" upon which petitioner seeks to base his claim were not known to the policy makers and were only uncovered in the course of defendants' Internal Affairs investigation. As soon as these matters came to light, the individual officers involved were terminated.

The cases cited by petitioner are consistent with the holding below and thus show no split of authority exists. Petitioner's citation of the District Court Order in Brandon v. Allen, 516 F.Supp. 1355 (W.D.Tenn. 1983), rev'd, 719 F.2d 151 (6th Cir. 1983), rev'd & remanded sub nom Brandon v. Holt, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), supports the holding of the Court's below. Liability in Brandon attached to a police chief because he "should have known" of the reputation of one of his officers for violence. In sharp contrast to the facts of Brandon, in this case, there is no evidence that any of the officers involved were "mental cases" who relished violent acts. Nor is there any evidence that Cobb County or Hightower knew or should have known of any

pattern of violence. There is no evidence that the officers in the instant cases had a widespread reputation for violence. There is simply no evidence to support a holding based upon Brandon.

C. No immediate "post-incident" evidence supports petitioner's claim.

Petitioner contends that there is a split of authority inasmuch as the Courts below "failed to analyze the non-action of the county immediately following the incident[.]" Petition, p. 12.[4] The facts remain that as soon as Director Hightower was informed of the incident that an investigation was begun. The facts are clear that the chain of command had no knowledge of the alleged constitutional violation. The County and Director Hightower

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[4] It appears that petitioner's real arguement is that the County and Director Hightower are liabile pursuant to "respondeat superior" for the acts of the officer's involved in the incident. See, City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989). In support of this "non-action" argument, petitioner merely cites to various facts about the actions taken by the patrol officers. Petition never once directs this Court to any fact which pertains to the policy making officials of Cobb County.

cannot be held liable solely because rogue officers fail to report their own misconduct. In fact, the officers' concealment shows that they clearly understood that they had violated County policy.

Petitioner's authority of Grandstaff v. City of Borger, Tex., 767 F.2d 161 (5th Cir. 1985), cert. denied, 480 U.S. 916 (1987), provides that:

> Where police officers know at the time they act that their [misconduct] will meet with the approval of city policy makers, the affirmative link/moving force requirement is satisfied

767 F.2d at 170. In the instant case, it is clear that the officers knew that their conduct would not meet with approval. In fact, the officers concealed their acts because they knew that County policy demanded that they pay the consequences for their actions.

Petitioner's authority of Grandstaff is also factually dissimilar to the instant case. In the Grandstaff case, there were "no reprimands, no discharges and no admission of error." Id. at 171. This contrasts starkly with the evidence in the instant case.

D. No "group action" evidence supports petitioner's claim.

In support of his agrument that "[t]he Court below . . . ignored the fact that a group of officers inflicted policy brutality against David[,]" petitioner cites Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989). Contrary to petitioner's bare assertion, the holding of Bordanaro is completely consistent with the holding below. The full quote from which petitioner offers a selective sample is as follows:

> While is is true that evidence of a single event alone cannot establish a municipal custom or policy, [cit.], where other evidence of the policy has been presented and the "single incident" in question involves the concerted action of a large contingent of individual municipal employees, the event itself provides some proof of the existence of the underlying policy or custom.

Id. at 1156-57 (emphasis added, footnote omitted). Petitioner offered the Courts below exactly what the Bordanaro court indicated would not support liability: a single incident

with no "other evidence of the [improper] policy." Id.

Additionally, the facts of Bordanaro are significantly different from the instant case. In contrast to the instant case, Bordanaro: 1) involved the entire night watch of an entire police department, id. at 1153; 2) involved planned and premeditated acts of violence, id. at 1153-54; 3) involved a twenty-four year history of implementing a facially unconstitutional arrest and excessive force policy, id. at 1156; 4) substantial evidence of woefully inadequate training, id. at 1158-61, and 5) improper post-event investigation, id. at 1166-67. The holdings below are consistent with the holding of Bordanaro. Essentially, petitioner offers this Court a single incident of excessive force. The single incident upon which petitioner bases his case is simply insufficient under Oklahoma City v. Tuttle, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436-37, 85 L.Ed.2d 791 (1985).

II. Petitioner's "failure to establish policy" theory does not merit review by this Court.

Petitioner contends that constitutional violations occurred as a direct result of the absence of two specific affirmative policies.

Petitioner contends that a constitutional violation occurred because Cobb County had no specific policy "forbid[ding] relatives or girlfriends or boyfriends from riding with a policy officer[.]" Petition, p. 15. Petitioner also contends that a violation occurred because Cobb County had no specific policy "regarding how to handle transportation of a subject after the use of force." Petition, p. 16.

The only material which Petitioner relied in support of these claims was the affidavit of Louis J. Reiter, a purported police expert. This expert never states that Director Hightower or Cobb County violated any constitutional right of any party.[5] Instead of addressing the relevant issues of constitutional rights; the Reiter affidavit repeatedly identifies what Mr. Reiter considers "gross deviations from ordinary police practice."

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[5] Even if the expert did opine that certain acts were constitutional violations, that would still not defeat summary judgment. See, Marx v. Gumbinner, 905 F.2d 1503, 1507 fn. 6 (11th Cir. 1990). Respondents submit that the Courts must determine whether constitutional violations occurred from the facts of record.

No factual evidence was presented to show that the policies or lack thereof implicated any constitutional right. The facts clearly show that the mistreatment which petitioner alleges did not flow from any existing or absent policy of Cobb County or Director Hightower. In ruling on petitioner's claims, the District Court properly held that:

> There is no evidence of the necessary causal link between the lack of a policy or custom and the alleged constitutional violations in this case.

District Court Order at Appendix, p. 8a.

Surely, petitioner does not seriously contend that the framers of the Constitution intended the fourth amendment to mean that relatives cannot ride in a patrol car with an officer. There must be a proximate-causal relationship between the policy and the injury. This causal connection is missing in this case. Petitioner's lack of policy argument stretches concepts of causation beyond the limits of reason. It is simply <u>not</u> foreseeable that allowing relatives to ride in a patrol car or allowing an officer on the scene to use his discretion in arranging transportation will cause the use excessive force. Petitioner's injuries are simply too far removed from the

policy. Cf. Palsgraf v. Long I. R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

All of petitioner's "lack of affirmative policy" arguments share the same defects. In each case, the argument is unsupported by law and by fact. Even assuming factual support for the allegations, in each case, petitioner's argument falls prey to the remoteness and speculative nature of the alleged causal relationship. This aspect of plaintiff's claim was properly decided below under this Court's clear holding in Canton v. Harris.

III. Petitioner's "inadequate training" theory does not merit review by this Court.

With regard to petitioner's "failure to train" claim, the District Court properly held as follows:

> Plaintiff has not demonstrated to this court a deliberate indifference to the needs of the citizens by merely alleging that special police training is necessary[.]

District Court Order at Appendix, p. 8a. Petitioner continues to claim that a purported lack of training brings this case within the ruling of City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989),

which held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 109 S.Ct. at 1204 (emphasis added). In the instant case, there is no evidence to support a finding of "deliberate indifference" to citizen's rights on the part of Cobb County or Director Hightower. In fact, the County and the Director have made an affirmative showing that proper training was in place.

Petitioner's training allegations center on the issue of training for responding to "teenage drinking parties." Petitioner offers his sole support for this argument in the form of an opinion affidavit from Mr. Rieter, a purported police expert. Essentially, petitioner's retained affiant merely opines that there was a "gross deviation from standard police practice generally." This affidavit is insufficient to support petitioner's claim for a number of reasons.

First, Mr. Rieter does not state the facts necessary to allow the Court to draw its own conclusions regarding the constitutionality of the training situation. See, supra, fn. 5 (impact of opinion evidence on Court's

determination). Rieter must rely upon the facts appearing of record to support his conclusions; however, Rieter identifies no such facts. Rieter's affidavit does not speak to the issue at hand (i.e., constitutional wrong), but instead, merely states his own opinions of desirable training without a factual basis for him to opine that training was insufficient.

Second, the clear factual material of record shows that the officers received the proper training in the basic police skills necessary to handle their assignments - including responding to "loud party" calls. Rieter provides no factual basis for his assertion that special training was necessary, nor does Rieter provide any detail as to why the present training was insufficient or what his proposed circiculum would include. In contrast, Director Hightower on deposition testified that responding to "loud party" calls "is all a part of the overall training." "[I]t does not require a specific seminar entitled how to enforce laws pertaining to teenage drinking parties."

Third, training with regard to "loud party" calls is unrelated to the injury claimed which resulted from a struggle that took place after a car chase and a foot chase which ended in another neighborhood. See, supra, pp. 5-9. The injuries complained of did not occur at the

site of a "teenage drinking party," nor did they result directly from police response to such a party. Officer Campuzano's response to a "loud party" call was his first interaction with David Eldridge; however, there was no injury as a result of this interaction. By the time any injury was inflicted, this matter had ceased to be a "loud party" call and had become first a car chase and then a foot chase to arrest a suspect. Accordingly, Rieter's Affidavit opinion that there was insufficient "party" training is not only lacking in factual basis, it is also clearly factually immaterial.

CONCLUSION

Wherefore for all the above stated reasons, the respondents respectfully request that the Petition for Writ of Certiorari be denied. Review on writ of certirorari is a matter of discretion and should only be granted when supported by special and important reasons. U.S. Sup. Ct. Rule 10; Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 73 (1955).

In this case, the petitioner is not seeking a writ of certiorari to settle important legal issues or to harmonize the laws

of the several circuits. Rather, the petitioner merely wants this Court to review the evidence (which petitioner has badly misconstrued) to determine compliance with existing precedent. This is not an issue of great public importance which merits review by this Court.

Accordingly, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

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